Supreme Court of Illinois.

ADAM SMITH *v.* THE PEOPLE.

Possession of property recently stolen is *prima facie* evidence of guilt, and is sufficient to warrant a conviction for its larceny, unless the attending circumstances or other evidence so far overcome the presumption thus raised as to create a reasonable doubt of the guilt of the accused.

On the trial of one for larceny of goods, the possession of which by the accused four days after the theft was not disputed, the court instructed the jury "that the possession of stolen property soon after the commission of the theft is *prima facie* evidence that the person in whose possession it is found is guilty of the wrongful taking, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt:" *Held*, that the instruction was proper, and not open to the objection that it assumed the existence of any fact necessary to be proven which was disputed on the trial.

WRIT of error to the Criminal Court of Cook county.

Forrest & May, for plaintiff in error.

Luther Laflin Mills and *Geo. C. Ingham*, *contra.*

The opinion of the court was delivered by

SCOTT, J.—Accused was indicted for larceny of a wagon, and on a trial had in the Criminal Court of Cook county, was found guilty, and sentenced to a term of imprisonment in the penitentiary. Evidence was introduced tending to establish facts that show his guilt, and it is not claimed that on the testimony found in the record a new trial should be awarded had there been no error in the instructions given on behalf of the prosecution calculated to mislead the jury. The guilt or innocence of the accused is always a question for the jury, and their finding will seldom be disturbed, unless where it is manifest they have been misled by the instructions of the court to the prejudice of defendant.

The instruction given on behalf of the People, the correctness of which is called in question both in the argument and on the assignment of error, is as follows:

"The court instructs the jury that the possession of stolen property soon after the commission of the theft is *prima facie* evidence that the person in whose possession it is found is guilty of the wrongful taking, and is sufficient to warrant a conviction, unless

the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt."

There is no doubt there are contradictory decisions on this branch of the law, but in this state it is certainly settled that possession of property recently stolen is *prima facie* evidence of guilt, and is sufficient to warrant a conviction unless the attending circumstances or other evidence so far overcome the presumption thus raised as to create a reasonable doubt of the guilt of the accused, when, of course, an acquittal should follow. This principle is so definitely determined by the decision of this court in *Comfort* v. *The People*, 54 Ill. 404, it need not now be discussed as a new question.

The instruction as given states the law nearly in the precise terms it is declared by this court to be. Nor is it subject to the objection that it assumes any fact to be proved that was a matter of contention at the trial. It can not be said it assumes the existence of any fact, unless it was the possession of the property recently after it was stolen. That fact was proven by the People, and the accused admitted it came to his possession within four days after it was proven to have been stolen from the owner. Even if the instruction assumes the property was found in the possession of defendant shortly after it was stolen, that fact was not in dispute, and it certainly did the accused no harm. It was fairly left to the jury to find whether the other evidence and circumstances proven either by defendant or the People, sufficiently overcame the presumption of guilt raised by proof of possession of the stolen property shortly after the theft had been committed.

The facts the evidence tends to establish show the guilt of the accused past all reasonable doubt, and as the law applicable to the facts was fairly given to the jury, there is no ground for setting aside the verdict. The judgment will be affirmed.

Judgment affirmed.

The decisions in the various States upon the question as to what is the effect in a trial for larceny, of proving the possession of the stolen property by the accused, are certainly numerous, and in some of the States the difference in the language used by the various courts is very great, but it will generally be found that the authorities differ very little in principle.

The mooted points seem to be First, whether the mere fact of finding the stolen property in the possession of the accused is sufficient of itself to warrant a conviction, or in other words what is the strength of the presumption raised by such a finding. Second, whether the presumption raised is one of law to be decided by the court or one of fact to be decided by the jury; and Third, whether, when it is shown that the

accused had recent and exclusive possession of the stolen property, the burden of proof is not shifted and thrown upon the defendant, making it necessary for him to prove how he came by the property or to be considered guilty of the offence.

As to the first question, it is generally admitted that the mere proof of the possession of the article stolen, without any evidence as to whether that possession was either recent or exclusive, is not of itself sufficient to raise a presumption of guilt strong enough to call upon the prisoner for a defence. The necessary circumstances which obviously must surround the possession must also be shown; the questions—how recent was the possession—was it exclusive—what was the nature of the articles—were they such as passed rapidly from hand to hand—or were they so marked that they could not have been transferred without raising suspicion —must be answered before any rule upon the subject of the strength of the presumption can be stated. It is but natural to suppose that when the rule "that the possession of stolen property is *prima facie* evidence of guilt," is laid down either by text writers or by the courts, without other qualifications, the attending facts must also have been taken into consideration.

The best general rule upon the subject seems to be that proof of the possession of stolen property is one of the circumstances which go to show the guilt of the person accused and is to be looked upon in the same light as any other fact in the case. It may be a circumstance which when coupled with the surrounding facts, will be strong enough to raise a presumption of guilt, and, if uncontradicted, will justify the conviction of the person on trial; on the other hand it may not raise, even when the surrounding circumstances are proved, a presumption strong enough to hold the prisoner, unless it is supported by other facts, such as the denial of the possession by the accused, or some circumstance not connected merely with the possession itself. The presumption raised depends for its strength entirely upon the attending circumstances, or the answers to the questions which I have before enumerated. No fixed rule can be laid down to cover all the cases that may arise; it is a presumption not capable of being governed by general rules, each case differing from another in the facts that make the foundation for the rule that is to govern them.

The two extremes of the law which have been held are—on the one hand, that the possession is not evidence, to convict of the crime: *People* v. *Gassaway*, 23 Cal. 51; *The People* v. *Chambers*, 18 Id. 383;—on the other hand that it is sufficient to convict if not contradicted (*State* v. *Weston*, 9 Conn. 537). These rulings have been criticised (*Knickerbocker* v. *People*, 43 N. Y. 177), and it has been asserted that Greenleaf is responsible at least for the former decisions by reason of the law which he lays down in the third book of his commentaries.

As general rules they are undoubtedly bad, but when they are applied to cases where the facts authorize them, they may be both equally sound. The first may be sound when there is nothing but the bare possession, proved, without anything else; and this is what is meant by Greenleaf, when he lays down the rule in the 3d volume of his work, § 31; or it may be correct in the well-known case of a stolen negotiable note, where possession even a short time after the theft would not carry with it a presumption of guilt. The soundness of the second rule, when applied to an individual case, cannot be better illustrated than by quoting an unreported case in Pennsylvania.

The prisoner was charged with the larceny of a rope; the evidence produced proved that the rope was hanging in front of a store; that the prisoner was seen just before he got to the pavement in

front of which the rope was hanging, and was arrested on the pavement below, walking away with the rope in his hands. No one saw him take the rope; it was merely a case of the proof of the possession of stolen property by the accused, but no one would dispute the rule that possession in this case would carry with it such a presumption of guilt as would convict the prisoner of the offence.

The general weight of the authorities therefore seem to bear out the rule that the proof of the possession of stolen property carries with it a presumption of guilt strong or weak, in proportion to the recentness of the theft, the exclusiveness of the possession and the nature of the articles stolen, and this presumption is to be looked upon as any other fact tending to show the prisoner's guilt of the crime for which he stands indicted: *Commonwealth* v. *Montgomery*, 11 Met. 534; *Commonwealth* v. *McGorty*, 114 Mass. 290; *Engleman* v. *State*, 2 Ind. 91, 97; 2 Starkie's Ev. 615; Wharton's Crim. Ev., § 758, and cases cited; 1 Greenl. on Ev., § 34; 9 Cox Criminal Law Cases 465, &c.

In regard to the second question, as to whether the presumption is one of law or fact there seems to be little dispute. There have been cases in some of the courts in which it has been held that it is the duty of the court to instruct the jury as to whether the presumption has been raised or not, and as to its effect and degree of strength: *Pennsylvania* v. *Stephen Myers*, Addison's Reports 321; *State* v. *Brown*, 75 Missouri 317; references in Whart. Crim. Ev., § 758, and Best's Ev., § 322, but these decisions have almost all been overruled. (See *State* v. *Hodge*, 50 N. H. 510, and cases cited; *The State* v. *Hodge*, 53 Ind. 340; also see Wharton, Greenleaf and Best's Evidence before quoted.) All the authorities both in this country and in England agree in holding the presumption is purely one of fact; that it is the province of the jury to determine by weighing the attending circumstances, whether there has been a *prima facie* case made out, or whether the presumption raised is strong enough to overcome the rebutting testimony and prove beyond all reasonable doubt the guilt of the accused. The presumption is not one to which the arbitrary rules applicable to presumptions of law can be applied; the whole question of the presumption in each case depending solely upon the facts as found by the jury in each particular instance: *Commonwealth* v. *Montgomery*, 11 Met. (Mass.) 534, &c.; *The State* v. *Richart*, 57 Iowa 245, and authorities quoted above.

Upon the last point—as to whether the proof of recent and exclusive possession of stolen property does not throw upon the prisoner the burden of proof—there is certainly some difference of opinion. Some writers have laid down the rule most explicitly, that upon such proof, unless the defendant shows how he came by the goods, or proves his innocence, the burden of proof being on him, there should be a verdict of guilty: Best on Presumptions, 47 Law Lib. (N. S.) 804; *Knickerbocker* v. *People*, 43 N. Y. 177. Others have said that it is not possible that the burden of proof should change no matter how strong the evidence of the prosecution may be, that it is a fundamental principle of the law that the proof offered by the prosecution must of itself be strong enough to convict the defendant before he is called upon to make his defence and that the case cannot be made out by reason of anything that the defendant may or may not do, that the burden of proof is always upon the prosecution and that it is erroneous to say that upon proof of a certain fact that burden is shifted to the defendant: *Stover* v. *People*, 56 N. Y. 315, &c.

It is true that the proof of a recent and exclusive possession, if not rebutted by any evidence produced by the prisoner, may be enough to convict him, but it does not seem proper to say that the

burden of proof, for this reason, as a matter of law, is always, upon such proof, changed. It may well be said that the non-contradiction of the evidence of possession or the want of an explanation of how the accused became possessed of the property, tends to decrease the probabilities of his innocence and that in proportion to increase or strengthen the evidence of his guilt, but unless the prosecution by the evidence it has produced has shown beyond reasonable doubt that the prisoner is guilty, the burden of proof is not thrown upon him to prove that he is innocent. This is probably what is meant by the writers who assert in the technical language of the criminal courts, that the burden of proof is changed upon proof of exclusive and recent possession of the stolen property. The rule that "*Ei incumbit probatio qui dicit, non qui negat*" is too well established to be the subject of controversy.

It may therefore be said, in conclusion, that unless the recent exclusive possession proved is, under the circumstances, enough to show the prisoner guilty beyond all reasonable doubt the burden of proof is not thrown upon him.

CHARLES BIDDLE.

Philadelphia.

Supreme Court of Tennessee.

WHITMORE *v.* BALL.

On a motion for a new trial affidavits of jurors are admissible, even in a civil case, to show the misconduct of the jury after retiring, so as to vitiate the verdict.

If the jurors decline on the application of a party to give an affidavit of the facts, the trial-judge should, on motion of such party, call the jurors before him by process and examine them in open court touching the alleged misconduct.

If he has refused so to do, the Supreme Court will, where the affidavit of the applicant party showed an admission of misconduct by jurors, and the same was not denied by the opposite party nor contradicted by the jurors, award a new trial.

THIS was an action for libel in which, after verdict, the defendant moved for a new trial and read his own affidavit stating his grounds as follows: That A. M. Stoddard, one of the jury, after the jury had retired for consultation, stated to it that to his knowledge W. S. Trask, who wrote the article in the "Ledger," about which this controversy is, had prejudice and malice against the plaintiff, because when plaintiff had charge of the European Hotel, he had refused to give Trask free dinners or free meals, or free board at his house; that the "Public Ledger," which published the article complained of, and of which Whitmore is the owner, had published other articles defamatory of individuals, and that he wanted to stop it; that said Whitmore had published unjust and false articles about a society of which he (the juror) was a member, and that he had not forgotten it, and that he wanted to punish Whitmore for